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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 432

MORAND BROTHERS BEVERAGE CO., SAM CASSEL COMPANY, CRESCENT WHOLESALE LIQUORS, INC., CONTINENTAL DISTRIBUTING CO., INC., JUDGE & DOLPH, LTD., KUSPER OLD FORT DEARBORN CO., NATIONAL WINE & LIQUOR CO., INC., OLD GOLD DISTRIBUTORS, INC., PIONEER ATLAS LIQUORS, INC., SOUTH SHORE LIQUORS, INC., UNION LIQUOR CO., INC., METROPOLITAN LIQUOR COMPANY, SOUTH SIDE CENTRAL LIQUOR DISTRIBUTORS, INC., CENTRAL LIQUOR DISTRIBUTORS, INC., STAR LIQUORS, INC., BLUE ROSE LIQUOR CO., INC., CASEY & EVANS, INC., GERSHUNY & EPSTEIN, INC., INTER-NATIONAL LIQUOR CO., OLD CASTLE DISTRIBUTORS, INC., STANDARD LIQUORS, INC., UNIVERSAL WINE & LIQUOR CO., THE UNIVERSAL LIQUOR COMPANY, INC., WINDY CITY LIQUOR DISTRIBUTORS, INC., NATIONAL CORDIAL CO., INC., SAM FRIEDMAN, LENA FRIEDMAN, SIDNEY FRIEDMAN, MEYER SMITH, MAE SMITH, HYMAN SMITH, and ROSE H. SMITH, Individually and d/b/a CAPITOL WINE & LIQUOR CO., JOHN L. PICONI and NENO BRANCHINI, Individually and d/b/a CITY WINE & LIQUOR CO., ANGELO FANTOZZI, STELLA FANTOZZI, GINO DEL DOTTO and LOUIS DEL DOTTO, Individually and d/b/a FANTOZZI & CO., ABRAHAM COOPER, IDA COOPER, RUFUS COOPER and DESMOND ROSEN, Individually and d/b/a WEST SIDE WHOLESALE LIQUOR DISTRIBUTOR, DESMOND ROSEN, ABRAHAM COOPER, IDA COOPER and MAX COOPER, Individually and d/b/a MERCHANTS LIQUOR DISTRIBUTORS, JACK HOLT and GEORGE MARCUS, Individually and d/b/a HOL-MAR CO., OSCAR LEVY d/b/a LA SALLE WINE & LIQUOR CO., HARRY WEINSTEIN and JOSEPH WEINSTEIN, Individually and d/b/a ROSELAND LIQUOR CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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LOUIS A. KOHN,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners herein, by Leo F. Tierney, Louis A. Kohn, Stuart Bernstein, and Francis W. Collopy, their attorneys, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 28, 1953, and the decree in conformity with that judgment entered June 26, 1953.

OPINIONS BELOW.

The initial decision and order of the National Labor Relations Board (R. I-45)[1] is reported at 91 N. L. R. B. 409. The initial opinion of the Court of Appeals (R. I-

[1] The Appendix to Petitioners' Brief in the Court of Appeals in the first proceeding, No. 10335, is herein referred to as R. I, and the Appendix in the second proceeding, No. 10727, is referred to as R. II.

495) is reported at 190 F. 2d 576. The supplemental decision and order of the National Labor Relations Board (R. II-49) is reported at 99 N. L. R. B. No. 55. The second opinion of the Court of Appeals (R. II-878) is reported at 204 F. 2d 529.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 28, 1953 (R. II-890), and its Supplemental Decree was entered on June 26, 1953. (R. II-891.) Time for petitioners to file this Petition was extended to October 24, 1953. (R. II-foll. 906.) The jurisdiction of this Court is invoked under 29 U. S. C. §§ 160(e) and (f), and 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The pertinent statutory provisions are Sections 7, 8(a)(1), 8(a)(3), 10(c), 10(e) and 10(f) of the National Labor Relations Act (hereafter called the "Act"), being 29 U. S. C. §§ 157, 158(a)(1), 158(a)(3), 160(c), 160(e) and 160(f), and are printed in Appendix A, *infra*, p. 25.

STATEMENT OF THE CASE.

Introductory.

This case is one of two[2] which have recently reached Courts of Appeals raising the ultimate issue whether employers in a multi-employer bargaining unit may take defensive action against their employees when strike action after a bargaining impasse is taken against only one employer of the multi-employer unit.

The significance of this issue is evidenced by the volume of comment on this problem generally and on this case specifically during the course of its tortuous journey

2. The other is *Leonard* v. *N. L. R. B.*, 205 F. 2d 355 (C. A. 9, 1953).

through the Board and Courts.[3] That practitioners in the field as well as the commentators recognize the importance of the problem is evidenced by the intervention of employer and labor groups as *amici curiae* in the Court of Appeals.[4]

This wide-spread interest is no doubt due to the rising incidence of bargaining on the basis of multi-employer units. The Bureau of Labor Statistics has reported that in 1947 approximately 4,000,000 workers were covered by agreements negotiated between trade unions and groups of employers, and that this number had risen to an estimated 5,000,000 workers by 1951.[5] The percentage of employees subject to such agreements varies from a high of 71% in the Pacific Region to a low of 7% in the East South Central Region.[6] The National Labor Relations Board (hereafter called the "Board") has stated that the uniformity and stability of labor conditions resulting from this

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3. See Appendix B, *infra*, p. 29. The Board has itself recognized the importance of the problem in a letter written by its chairman to the Court of Appeals after the Court's second opinion. See Appendix C, *infra*, p. 31.

4. Labor groups which filed *amici* briefs were American Federation of Labor; International Brotherhood of Teamsters; Chauffeurs, Warehousemen and Helpers of America; Bakery and Confectionery Workers International Union of America; Retail Clerks International Association; and Liquor and Wine Salesmen's Union, Local 62, Affiliated with Distillery, Rectifying and Wine Workers International Union of America.

Employer groups were Union Employers Section, Printing Industry of America, Inc.; San Francisco Employers Council; Chicago Bakery Employers Labor Council; Seattle Department Stores Association; and National Beer Wholesalers Association of America. R. I. 492-94.

5. Collective Bargaining with Associations and Groups of Employers, B. L. S. Bulletin No. 897, U. S. Dept. Labor (1947); Collective Bargaining Structures: The Employer Bargaining Unit, B. L. S. Report No. 1, U. S. Dept. Labor (1953).

6. Collective Bargaining Structures: The Employer Bargaining Unit, *supra* n. 5, at p. 12.

form of bargaining has been found to be beneficial and desirable.[7]

One of the more critical questions presented by this bargaining form is the extent to which the multi-employer unit can retain its integrity in the face of strike action, after a bargaining impasse, against only one employer or a small group of employers in the multi-employer unit.[8] This device of striking only part of the unit and then moving on to another small segment has been termed "whipsawing". The Union can exert almost irresistible pressure on a single employer who finds his fellow members of the multi-employer unit—who are also his business competitors—gathering his market, while the Union can support the small part of its membership which is on strike almost indefinitely. Unless the multi-employer group may exert counter-pressure the strike action must always be successful.[9]

This case has been twice before the Board and twice before the Court of Appeals. Six opinions (not including one dissenting Board opinion) have been written on the merits of the arguments and the weight of the evidence—two each by the Trial Examiner, the Board and the Court of Appeals. Clashes between the respective functions of administrative agency and reviewing court have developed. The record is now over 1400 pages long. In the progress of this case from charge filed to this Petition, issues have

7. See *Rayonier Incorporated*, 52 N. L. R. B. 1269, 1273-74 (1943). See also *The Multi-Employer Lockout*, 3 Utah L. Rev. 122, 125 n. 22 (1952). It has also been said to have become a defensive technique for small businessmen against the demands of strengthened unions. *Multi-Employer Bargaining and the National Labor Relations Board*, 66 Harv. L. Rev., 886, 886-87 (1953).

8. See Littler, The Right To Lockout, Section of Labor Relations Law, 1952 Proceedings American Bar Association 4, 6 (1952).

9. The technique is described in *Leonard* v. *N. L. R. B.*, 205 F. 2d 355, 356 (C. A. 9, 1953) and in *Whipsawing in Multi-Employer Bargaining*, 3 Stanford L. Rev. 510 (1951).

been raised, dropped and obscured. Because of the length of the record and involved metamorphosis of this litigation, this Statement of the Case will be longer than that which might ordinarily be appropriate, and the indulgence of the Court is respectfully requested.

Background of Dispute.

Petitioners are wholesale distributors of alcoholic beverages in Chicago, Illinois. During the pertinent period they were all members of either the Illinois Wholesale Liquor Dealers Association (hereafter called the "Illinois Association") or the Chicago Wholesale Liquor Dealers Association (hereafter called the "Chicago Association"). The exclusive collective bargaining agent for all salesmen of petitioners was the Liquor and Wine Salesmen's Union, Local 62, Distillery, Rectifying and Wine Workers' International Union of America, A. F. L. (hereafter called the "Union"). Since 1942, collective bargaining had been carried on between the Union and representatives of the Associations. Agreements reached were subject to approval by a majority of the members of the Associations, and after approval separate but identical contracts were executed by each member. (R. I-79-80, 236-42.)

Negotiations for the 1949 contract started early that year, following the established pattern of bargaining on behalf of the petitioners by the Associations. An impasse was reached on the issue of increase in salesmen's commissions and the 1948 contract, due to expire on January 31, 1949, was extended by agreement between the Union and the Associations to March 15, 1949. (R. I-475.) By March 15, 1949 the impasse had not been broken, and on the following day the Union sent a "second supplemental agreement" to each of the members of the Associations, incorporating the Union's last offer, with a letter stating

that it was imperative that the enclosed supplement be executed without further delay. (R. I-478-81.)

None of the members of the Associations executed this supplement, and on March 19, 1949 the Illinois Association reminded the Union that negotiations had always been conducted on an industry-wide basis, and that since the supplement was not approved by the Associations it would not be executed. (R. I-481-2.)

Later that month the Union membership, which included all salesmen of all petitioners (R. I-226-27), unanimously voted general strike authorization. (R. I-209-10.) Petitioners, learning that the Union contemplated striking less than all the petitioners, prepared in blank a letter which it intended to send to all salesmen in the event one petitioner or small group should be struck. (R. I-164, 165, 180-81, 380-81.) This proposed letter stated that negotiations had always been conducted on an industry-wide basis, that a strike against one house was a strike against all, that the Union was advised of this position, and that since the salesmen of the Union walked out on one house the employers regarded this as a decision to strike every employer who had been a party to industry-wide negotiations; accordingly, the letter continued, the salesmen were asked to turn over immediately any records, papers, credentials or monies they had belonging to the employers, and to see the employers to settle any financial differences that might have existed.[10]

Negotiations continued, and on about April 4 the counsel for the Illinois Association informed the attorney for the Union that the letters were going out if the Union carried through its threat to strike one house. (R. I-384, 390-91.) The following day, April 5, the Union wrote to

10. This letter is reproduced in full in the first opinion of the Court of Appeals. R. I-497.

all members of the Association, other than Old Rose Distributing Co. (hereafter called "Old Rose"), that it would be erroneous to interpret a strike against one as a strike against all. (R. I-466.)

The day after the mailing of that letter the Union struck Old Rose, a member of the Illinois Association. (R. I-112.) After the Association members heard the recorded conversation of the Union president with an official of Old Rose, in which the Union stated that the strike arose out of general contract negotiations and not for reasons peculiar to Old Rose, the Association membership unanimously voted to send the letter (hereafter referred to as the "April 7 letter") to all salesmen. (R. I-364-65.) This letter was sent to all salesmen of every petitioner. (R. I-112-13.) The salesmen were out from April 8 to about May 1, at which time all but one of approximately 800 returned to work. (R. II-79, 888.)

First Board Proceeding.

Upon charges filed by the Union, the Board on May 4, 49 ~~1952~~ issued its complaint charging discrimination in violation of Section 8(a)(3) of the Act, and interference in violation of Section 8(a)(1) of the Act. (R. I-413, 428.)

Evidence at the first hearing showed that salesmen, after receiving the April 7 letter, considered themselves "discharged," "fired," "through," "locked-out," "no longer employed," and "their services no longer required." (R. I-143, 159, 169, 176, 179, 191.) Salesmen picketed, carrying signs reading "Locked-out and discharged." (R. I-173.) The salesmen indicated no serious effort was made to obtain employment elsewhere. (R. I-206, 213-14, 221, 223.) None was replaced by his employer. (R. I-504.) The Trial Examiner found that the Old Rose employees—the initial strikers—were "discharged" since the letter of April 7 was sent them also, and that all other salesmen were "locked-out", that such action was in violation of

Sections 8(a)(1) and 8(a)(3) of the Act, and recommended an award of back pay for all salesmen, including the Old Rose employees. (R. I-84, 87-88.) The Board stated that it accepted the findings of the Trial Examiner and stated that all salesmen were "discharged" in violation of the Act (although that was not the finding of the Trial Examiner), but held that back pay should be awarded to all employees other than the Old Rose salesmen; that the Old Rose salesmen, being strikers, were not entitled to back pay unless they unconditionally requested reinstatement during the strike. (R. I-47, 58 n. 19.)

Court's First Opinion.

On review of this order, on cross-petitions by the Board for an enforcement decree and by petitioners to set aside the Board order, the Court of Appeals stated that the petitioners—

> "* * * could quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one petitioner, was, in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union. It follows that they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking union and as to whom there was not then in effect any collective bargaining agreement." (R. I-503.)

The Court recognized that the Board did not share its view with respect to the validity of the use of the lockout in this circumstance, the Board already having expressed a contrary view in another proceeding. (R. I-503 n. 4.)

The Court concluded that although a lockout or temporary severance of employment would be valid, a permanent severance would be unlawful, since permanent discharge for strike activities has long been held to be unlawful. (R. I-504.) The Court granted enforcement of the

order of the Board with respect to Old Rose, pointing out that the Trial Examiner apparently did not consider that the Old Rose salesmen were merely laid off or locked out since they were already on strike when the April 7 letter was mailed to them. (R. I-505 n. 5, 506.) Old Rose complied with that order which was limited to posting of notices. All its salesmen had already gone back to work, no back pay being awarded as there was no evidence of an unconditional request for reinstatement during the strike. Old Rose is thus no longer a party to this proceeding. With respect to the salesmen of the petitioners, the Court found there was no clear finding whether the severance was temporary or permanent—the Board stating that it agreed with the Trial Examiner that the severance was a "discharge" while the Trial Examiner had described the severance as a "lockout". (R. I-505.)

The Court therefore remanded the case to the Board, directing "that it make a clear and explicit finding on the question whether the severance of the employer-employee relation between the various petitioners (other than Old Rose) and their respective salesmen was intended to be temporary or permanent and, if intended to be temporary in character, in view of the Board's further consideration, whether it was made for the purpose of 'interfering or coercing employees in the rights guaranteed to them by Section 7' or as a legitimate exercise of petitioners' economic remedies; and, if permanent, whether, in the light of the principles announced in this opinion, a back pay award would tend to effectuate the policies of the Act." (R. I-505-6.) Upon motion by petitioners, the Court ordered the Board to hear and receive additional evidence on the remanded questions. (R. I-507.)

Board Proceedings on Remand.

Thereupon a second hearing was held before the same Trial Examiner who conducted the original hearing. The

petitioners introduced evidence that their intention was not to sever permanently the employment relationship (R. II-113, 250, 283, 315, 433, 454, 486); that the salesmen's names or identity by code number were retained on invoices during the course of the strike (R. II-113-14, 190, 263, 283, 310); that no effort was made to replace salesmen during the course of the strike (R. II-250, 263, 280, 283, 301, 458); that employee eligibility on insurance plans was maintained during the strike, premiums being paid either by advances by the employer or from deductions previously made. (R. II-188-89, 258, 300-01, 316, 455, 557-58, 561-62, 758-60.) The Board's evidence consisted of statements of various parties that the salesmen were "fired," "dismissed," "discharged," or "through." (R. II-365, 381, 392, 414.) The Board, by again resorting to such ambiguous terminology, disregarded the remand order which was to determine whether the severance was "permanent" or "temporary." Evidence was introduced that when a salesman was permanently severed in the past he was ordered to turn in his books and records (R. II-336, 369), from which it was argued that the request in the letter of April 7 to turn in records meant discharge. (R. II-52.) Yet, one of the salesmen who testified that turning in books and records meant discharge also stated that he came back to work without being asked to do so when he heard the strike was over. (R. II-343.)

The Board also introduced as a witness Allen Schultz, the then attorney for the Chicago Association, who testified that it was the intent of the employers to create a "legal discharge" but not a "lockout" which was thought to be unlawful. (R. II-224-25.) Counsel for petitioners was denied the opportunity to determine what the witness understood a "lockout" or "legal discharge" to be. (R. II-238-39.) This witness also testified as to the crucial

issue of permanence that he did not know whether it was the intention of petitioners to take the men back when the strike was over. (R. II-228.) The record indicates hostility had arisen between this witness as counsel for the Chicago Association, and the Illinois Association, and that the witness had urged separate settlement with the Union. (R. II-417-19, 453.) Members of the Chicago Association testified for the petitioners that there was no talk of "legal discharge" or "lockout" by Schultz. (R. II-453-54, 473-74.) An attorney for the Illinois Association denied the terms "legal discharge" or "lockout" were used by Schultz. (R. II-483-84.)

The Trial Examiner, without making express determinations of credibility or resolutions of any testimonial conflicts, found that the employers intended the severance to be temporary, and only for the duration of the disagreement. (R. II-82.)

The Board reversed this finding of the Trial Examiner and found the petitioners intended to create a permanent discharge. (R. II-64.) Although claiming to accept all resolutions of credibility made by the Trial Examiner (R. II-51), the Board reversed the only determination that was peculiarly within the competence of the Trial Examiner, depending so much, as it did, on the impression gained by the trier-of-facts from the demeanor or conduct of the witnesses. The Board rejected as "self-serving" and "inherently unreliable" the declarations of the petitioners that they intended to take back all the salesmen (R. II-53, 57), and relied on the testimony of Allen Schultz (R. II-54-57), and the return of books and records argument. (R. II-52.) There was no attempt to make specific findings on the nature of the discharge with respect to the "various petitioners * * * and their respective salesmen." (R. I-505-6.)

The Board went further. Despite the clear holding of

the Court of Appeals, it took issue with the Court on the validity of the temporary severance, even after it had found the severance here to be permanent. (R. II-64-72.)

Court's Second Opinion.

The Court of Appeals, on review of the order of the Board issued pursuant to the remand (again on cross petitions of the Board and petitioners), severely chastised the Board for ignoring the "law of the case" as laid down by a superior tribunal.[11] The Board violated this basic tenet by its "express disapproval of our prior opinion," which "implies an attitude on the part of these members [of the Board] to have their ultimate judgment that petitioners had engaged in unfair labor practices recognized in any event." (R. II-882-85.)

However, on the review of the finding of the Board that the severance was permanent, the Court said that it was "not prepared to say that the evidence relied upon by the Board, together with the reasonable inferences available therefrom, was not substantial and adequate." The Court indicated an awareness that the findings of the Trial Examiner could not be completely ignored, but did not indicate what, if any, weight the contrary finding of the Examiner on the issue of permanence of severance was accorded in its decision to affirm the Board on this question.

The Court again noted the ambiguous character of the various terms such as "discharge," "lay-off," "legally discharged," "fired" and "dismissed," and phrased the issue more precisely as whether the employers intended that upon the cessation of the strike, the salesmen would be automatically reinstated or whether it would be necessary for them to reapply for employment. (R. II-887.)

11. The Board, in a subsequent letter to the Court, explained its action in this regard as a "preservation of its position for eventual review." See Appendix C, *infra*, p. 31.

However, despite this precise delineation of the issue, the Court did not appear to weigh the evidence in the light of this statement. In fact, there was no evidence that any employee of the hundreds returning to work had to apply for re-employment, and at least one stated he returned without ever having been asked to return by his employer. (R. II-343.)

The Court summarily affirmed the award of back pay as being a matter within the discretion of the Board. (R. II-889.)

QUESTIONS PRESENTED.

1. Whether the Board abused its discretion by the award of back pay under the following circumstances to employees held to have been unlawfully discharged: employees were all members of a Union which bargained on their behalf with a multi-employer bargaining group; after a bargaining impasse, strike action was taken directly against only one employer of the multi-employer group; the Court below affirmed the Board's finding that the employers' defensive action against such strike constituted a permanent discharge of all employees, the Court having previously held that under these circumstances the employers could have temporarily discharged all employees for the duration of the strike since the strike was against all employers of the group; such discharge was held to have been permanent even though all employees were taken back on the termination of the dispute; back pay was not awarded to the initial strikers but to all other employees.

2. Whether the Court of Appeals correctly applied the principles of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), in the weight it accorded the Trial Examiner's finding that the employers intended a tempo-

rary severance, and whether its action in that regard conflicts with the decisions of other circuits.[12]

REASONS FOR GRANTING THE WRIT.

1. The Board action in awarding back pay disregarded established limitations on the use of this remedy and in effect nullified the holding of the Court of Appeals that a multi-employer bargaining group can take defensive action against an economic strike aimed at one member or a small part of the group; hence the award raises a question of extreme importance in the administration of the Act which should be authoritatively determined by this Court.

The Court, in its second opinion, affirmed the finding of the Board that the employers intended a permanent severance of the employment relationship, and approved the award of back pay as a routine discretionary matter for the Board. Although petitioners urge, as a second reason for granting this Petition, that the Court erred in its second opinion in not giving due regard to the finding of the Trial Examiner of a temporary severance, petitioners here argue that even if the discharge were permanent,

12. The ultimate issue implicit in this question is whether the Court below reviewed the findings of fact and conclusions of the Board in accordance with the statutory standard of substantial evidence on the record considered as a whole. Sections 10(e) and (f) of the Act (29 U. S. C. §§ 160(e) and (f)). Petitioners also desire to argue, in the event this Petition is granted, that, aside from the conflict in the Board and Trial Examiner findings, the evidence so preponderates in favor of a finding of temporary, rather than permanent, discharge, that even if the Trial Examiner and Board agreed the discharge was intended to be permanent the Court should have held such finding to be not supported by substantial evidence on the record considered as a whole; that the Court did not apply that standard but one ante-dating the 1947 amendments to the Act, relying as it apparently did on *N. L. R. B.* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292 (1939) (R. II-889) and that the Court therefore "grossly misapplied" the statutory standard. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 491 (1951). By this reference petitioners intend to preserve this Question.

back pay should not have been awarded. The Board ignored the novel aspects of the situation before it, thereby abusing its discretion, and the Court should have intervened in the face of such abuse. This argument proceeds from the premise that the employers could have lawfully taken action to defend against the "whipsaw", and although their action may have exceeded the limits set by the Court, yet the action in excess of that which was proper did not cause any loss of pay to the employees.

The Court of Appeals in its initial opinion held that, as a matter of law, the employers could have temporarily severed the employment of their salesmen, because they could "quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one petitioner, was, in the strategic sense, a strike against the entire membership of their Associations." (R. I-503.) The Court, in its second opinion, further clarified this legal right of retaliatory action by stating that the severance could persist until the cessation of the strike (R. II-887)—this qualification being implicit in the first opinion.

The facts were that the salesmen returned to work as soon as the strike was terminated. Thus if the severance had been temporary—as the Trial Examiner found—there would have been no possible basis for a back pay award. There is no evidence that the employees suffered any greater loss of earnings because the severance was found to be permanent rather than temporary.

The Act permits the Board to direct affirmative action, including the award of back pay, "as will effectuate the policies of this Act." § 10(c), 29 U. S. C. § 160(c). The power of the Board, however, must be used to achieve the remedial objectives of the Act and is not punitive. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12 (1940).

Within the limits of the remedial objectives to be accomplished, the Board has broad discretion to fashion a remedy. But the limits must be observed—"The remedies must be functions of the purposes to be accomplished." *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). The purpose to be accomplished in the award of back pay is the "restoration of the situation * * * which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194 (1941)), or the reimbursement "for earnings lost by reason of the wrongful discharge" (*N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361, 363 (1951)). It must be shown that the illegal discrimination had a consequence measurable in monetary terms—loss of wages—which would not have occurred but for the discrimination. It is that consequence which the Board is authorized to rectify by an award of back pay.

In applying these principles the Board here took no account of the novel situation posed by the holding of the Court of Appeals in its first opinion. The Board assumed that, given a discriminatory discharge, the employees were deprived of their earnings solely because of that discharge. It is of course true that the conduct of petitioners' salesmen did not fit the usual pattern of strike activity —but doctrines evolved in the context of single-employer bargaining are not applicable to the situation here which is peculiar to multi-employer bargaining. The salesmen were all strikers, but not in the usual sense. In view of the fact that the employees could have been temporarily discharged as "strategic strikers" and thus deprived of their earnings, the question necessarily becomes whether the conduct of the employees as such "strategic strikers" and not the permanent discharge caused the loss of earnings. It was this crucial question which the Board did not consider.

The Board has long recognized that an unlawful discharge does not *per se* warrant the awarding of back pay.

Thus strikers who have been unlawfully discharged during the course of a strike are not awarded back pay unless and until it can be shown they unconditionally requested reinstatement. For, until that time "it cannot be established that the loss of pay was conclusively attributable to the employer's conduct." *Buzza-Cardozo*, 97 N. L. R. B. 1342, 1344 (1952); *Kallaher and Mee, Inc.*, 87 N. L. R. B. 410, 413 (1949). *In fact, in the present case, the Board refused to award back pay to the Old Rose salesmen for that very reason.* (R. I-58 n. 19.)

If the Old Rose salesmen were not entitled to back pay because their loss of wages during the strike period cannot be conclusively attributed to the employer, then consistent reasoning impels the conclusion that the loss of wages by the salesmen other than those of Old Rose is not attributable to the discharge, but to the strike which was held to have been against all employers. The loss of wages was induced by the salesmen, not by the employers.

The inconsistency between the treatment accorded by the Board to the Old Rose salesmen and all other salesmen clearly reveals that the Board has not accepted the ruling of the Court of Appeals that the strike against one employer was a strike against all. Having decided that the Old Rose salesmen were not entitled to back pay even though they were held to have been permanently discharged, the Board could have awarded back pay to the other salesmen only by denying that the strike was against all employers, thereby rejecting the "law of the case."

The holding of the Court of Appeals that the strike was a strike against all employers inevitably meant that all employees had to be treated in the same manner and that none had greater rights merely because the tactical approach of the Union required that one particular employer, rather than another, be struck first. The strategic

strike was against all employers, and the fact that the tactics called for an actual cessation of work by the salesmen of only one employer should give no greater legal rights to the other strategic strikers, nor should that subject the employers to differing degrees of liability. This the Court recognized in the first opinion when it asked the Board to consider, if the Board found the discharge to be permanent, "whether, in the light of the principles announced in this opinion, a back pay award would tend to effectuate the policies of the Act." (R. I-506.)

The Board refused to accept those principles; it refused to accept the ruling of the Court that a temporary discharge would have been lawful. It went out of its way to reject the principles, and having expressly rejected them obviously did not act upon them in considering the back pay issue.

The Court, in its second review of this case, did not follow the clear implications of its direction to the Board on the remand order to weigh the award of back pay in light of the principles of its first opinion. The Court briefly disposed of the back pay issue by stating that the question is a broad discretionary one for the Board, and must stand in the absence of a showing of a patent attempt to achieve ends other than those which fairly effectuate the policies of the Act. As we have demonstrated, the Board here made a patent attempt to frustrate the objectives of the Act. The Board expressly refused to follow the "law of the case" relating to the legality of temporary discharge as laid down by the Court of Appeals in its first opinion. In castigating the Board for this affront to its authority, the Court overlooked that the Board had indirectly accomplished through the award of back pay precisely what the Court recognized the Board members were attempting to do by their gratuitous attack on the

Court's first opinion—"to have their ultimate judgment that petitioners had engaged in unfair labor practices recognized in any event." (R. II-884.)

The Board has here disregarded established principles as to the award of back pay. It has made its award "without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act," and this the Board may not do. *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349 (1953).[13]

If retaliatory action by multi-employer bargaining groups against the "whipsaw" is proper, then this award must fall. Back pay can be upheld only on the view that the Court of Appeals incorrectly held that a temporary severance would have been lawful. The important problems inherent in this vital area of labor-management relations should be resolved by this Court.

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2. The Court of Appeals, in failing to give due weight to the finding of the Trial Examiner that the severance was intended to be temporary and not permanent in its review of the contrary finding of the Board, departed from

13. Moreover, the Board and the Court disregarded certain equities present in the case. The petitioners argued in the first proceeding that the Union itself committed unlawful practices in violation of Sections 8(b)(1)(B) and 8(b)(3) by attempting to force one member of the bargaining unit to accept its last offer while trying to mislead the other members of the unit into believing that the strike against the one had nothing to do with the Association negotiations but was for reasons peculiar to Old Rose. The Court, in its first opinion, rejected this contention (R. I-500-3) and although petitioners have not included this issue in the questions here presented, they may desire to urge this point if the Petition is granted. Nevertheless, whether or not the Union's conduct was an unfair labor practice, it should have been considered by the court in determining the propriety of back pay. The power of the Courts to enforce orders of the Board "are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity." *N. L. R. B.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 70 (C. A. 3, 1952).

the principles enunciated in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951). The decision below is also in conflict with recent decisions in other circuits following Universal Camera and is even inconsistent with a prior ruling of the Seventh Circuit itself.

In *Universal Camera,* this Court held that the Act evinces "a purpose to increase the importance of the role of examiners in the administrative process" and that reviewing courts should give to the examiner's report such probative force as it intrinsically commands. Findings of the Examiner which depend for their determination on the credibility of witnesses as shown by their demeanor or conduct at the hearing are entitled to greater significance. "The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case." 340 U. S. 474, 495-96.

It is apparent that the determination of the Trial Examiner that the intention of the employers in this case was to effect a temporary and not a permanent severance was one largely dependent on the credibility of witnesses. The appearance of petitioners as witnesses before the Trial Examiner was certainly an important factor to be considered in determining the weight to be accorded their testimony that they never intended a permanent discharge. Whether the various salesmen who testified they considered themselves "fired," "dismissed," "through," "discharged," or "locked-out" after receiving the April 7 letter from their employers understood these various terms to imply permanence of severance was also largely dependent upon their attitude upon the witness stand before the Trial Examiner. The testimony of Allen Schultz,[14] upon

14. The Board's evidence—particularly the testimony of Schultz—is analyzed and severely criticized by Petro, *The N. L. R. B. on Lockouts,* 3 Labor L. J. 659 (1952).

which the Board so strongly relied, would tend to take on a different meaning if heard directly than if read in the record. The Board characterized Schultz as one experienced in the field of labor relations and presumably familiar with the factual content of the terms he used. Yet perhaps his expertise was not as readily apparent to the trier-of-facts who observed his demeanor, may have considered the contradictions in his testimony, and weighed his testimony against the obvious conflict with that of other witnesses, including another attorney presumably as expert as Schultz. (R. II-479-85.) These instances are cited not to induce this Court to weigh the evidence, but rather to indicate that the finding of the Trial Examiner depended to a great degree, if not entirely, upon credibility and resolutions of testimonial conflicts.

However, the Court of Appeals gave no indication that any consideration was given by it to these factors beyond its naked assertion that "Added to all of this [petitioners' evidence] was the Examiner's finding of fact that the severance was intended to be temporary not permanent." (R. II-888.) The Court observed that the Board was of the opinion that the evidence preponderated in favor of a finding of permanent discharge, and that it was "not prepared to say that the evidence relied upon by the Board, together with the reasonable inferences available therefrom, was not substantial and adequate." (R. II-889.) Such assertion and observation does not appear to give to the Examiner's finding the consideration commanded by this Court in *Universal Camera*.

The disregard by the Court of the Trial Examiner's finding in this case is to be contrasted with the action of other courts when faced with a conflict in the findings of the Trial Examiner and Board. In each of these instances the Court, in following *Universal Camera*, rejected the finding of the Board and adopted that of the Trial Examiner.

Upon the remand of *Universal Camera*, the Court stated it should not be reluctant to insist that "an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded." *N. L. R. B.* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (C. A. 2, 1951).

Similarly, in *Ohio Associated Telephone Co.* v. *N. L. R. B.*, 192 F. 2d 664 (C. A. 6, 1951): "So viewing it, our judgment is that the examiner's finding with respect to the cause of discharges was, upon the whole record, based upon substantial evidence, unimpeached, and it was not in any way shaken by the Board's reasoning." Ibid., at 667. "We may not," the Court added at 668, "disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth."

In *N. L. R. B.* v. *Supreme Bedding & Furniture Mfg. Co.*, 196 F. 2d 997 (C. A. 5, 1952), the Board had stated that it accepted the findings of the Trial Examiner, but proceeded to reverse his determination that no unfair practice had been committed, much as the Board here stated that it accepted resolutions of credibility made by the Trial Examiner, and then reversed his finding which was so dependent on credibility. There the Court said:

> "Deprived of the support of the examiner's findings, its own findings indeed directly contrary to his, the Board is unable to make use of, the tributes to the perspicuity and the superior opportunities of the examiner, and the claims as to the binding force of his findings with which its briefs usually abound.
>
> "Instead, not denying *the examiner's superior opportunities to determine credibility,* its labors are directed to discrediting the examiner's determination as to the credibility of witnesses, where there is a conflict in testimony, and correctness of his apprehensions of, and inferences from the proven facts, where there is none." 196 F. 2d 997, 998.

The Court then weighed the findings of *both* the Board and Trial Examiner and concluded:

> "An examination of the record as a whole, in the light of these principles, leaves us in no doubt that the findings and recommendations of the examiner are, the findings and order of the Board are not, supported by it, and that the enforcement of the order should be denied." Ibid., 998-99.

The Seventh Circuit itself has recognized that where the Board has overruled the findings of a Trial Examiner, the reviewing court is charged with a greater duty under *Universal Camera* than that assumed by the Court in the instant case. In *U. S. Steel Co.* v. *N. L. R. B.*, 196 F. 2d 459 (C. A. 7, 1952), the Court analyzed the findings of the Examiner, then concluded that "The record as a whole supports the finding of the Trial Examiner * * * * We realize that the Board, upon reading the cold record, did not agree with the trial examiner's findings * * * but it was the examiner who had the opportunity to hear and see the witnesses." Ibid., at 467.

The action of the Court of Appeals in the instant case of merely reciting that the Trial Examiner had made a finding contrary to that of the Board, and then holding that it was not prepared to say that the evidence relied upon by the Board was not substantial and adequate, without first determining whether or not the Examiner's finding was not itself supported by even more compelling evidence, is completely contrary to what has been done by the Second, Fifth and Sixth Circuits and by the Seventh itself in the *U. S. Steel* case. It is manifestly apparent that the findings of the Trial Examiner were not accorded the respect they require under *Universal Camera.* The Court of Appeals has not given "a conscientious consideration of the entire record" and this should "invite review by this Court." *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503 (1951).

CONCLUSION.

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 1953.

APPENDIX A.

Pertinent Excerpts From the National Labor Relations Act, 29 U. S. C. § 151, et seq.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3). [29 U. S. C. § 157.]

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * [29 U. S. C. § 158 (a) (1), (3).]

SEC. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in

any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. [29 U. S. C. § 160 (c).]

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States, * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set

forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended. [29 U. S. C. § 160(e).]

SEC. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the

relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. [29 U. S. C. § 160(f).]

APPENDIX B.

Freidin, The Taft-Hartley Act and Multi-Employer Bargaining, Industry Wide Collective Bargaining Series, Wharton School of Finance and Commerce (1948).

Garrett and Tripp, Management Problems Implicit in Multi-Employer Bargaining, Industry Wide Collective Bargaining Series, Wharton School of Finance and Commerce (1949).

Littler, The Right to Lockout, Section of Labor Relations Law, 1952 Proceedings American Bar Association 4 (1952).

Hall, Impact of the Bargaining Unit on Labor-Management Relations, Proceedings of NYU Second Annual Conference on Labor 29 (1949).

Petro, The NLRB on Lockouts—I, II, 3 Labor L. J. 659, 739 (1952).

Somers, Pressures on an Employers' Association in Collective Bargaining, 6 Industrial & Labor Rel. Rev. 557 (1953).

Pierson, Prospects for Industry Wide Bargaining, 3 Industrial & Labor Rel. Rev. 341 (1950).

The Multiemployer Lockout, 20 Univ. Chi. L. Rev. 299 (1953).

Whipsawing in Multi-Employer Bargaining, 3 Stanford L. Rev. 510 (1951).

Multi-Employer Bargaining and the National Labor Relations Board, 66 Harv. L. Rev. 886 (1953).

The NLRB and Multi-Employer Units in a Competitive Economy, 43 Ill. L. Rev. 877 (1949).

Permissibility of Lock-Outs, Shut-Downs and Plant Removals, 50 Col. L. Rev. 1123 (1950).

The Multi-Employer Lockout, 3 Utah L. Rev. 122 (1952).

Employer Lockouts and Association-Wide Bargaining, 3 Labor L. J. 121 (1952).

Recent Case Comment, 65 Harv. L. Rev. 353 (1951).

APPENDIX C.

NATIONAL LABOR RELATIONS BOARD

June 26, 1953.

Honorable Walter C. Lindley, Judge,
United States Court of Appeals for
the Seventh Circuit,
Chicago, Illinois.

Re: Morand Brothers Beverage Co., *et al.*,
vs. N. L. R. B., No. 10727.

DEAR JUDGE LINDLEY:

On behalf of the Members of the Board I am writing to you, and to Judges Duffy and Swaim, concerning the position taken by the Board on the legal status of a lockout in its second decision in the above-entitled case. Since our sole concern is to explain, not to reargue, we think a letter may be more appropriate than a formal document in the litigation. Copies of this letter are nevertheless being sent to all parties in the case.

The Board Members are deeply concerned about the Court's observation that the Board's decision reflected a failure "to comply with the mandate" of the Court and evinced "an unwholesome outlook" incompatible with the role of court and agency in the administration of the National Labor Relations Act. While the Board might otherwise be disposed to accept this censure in silence, because it shares with others the usual doubt regarding explanations after the event, the gravity of the impeach-

ment and the Board's own continuing concern that it not overstep its administrative province impel this attempt at clarification. Particularly because, as the Court noted, I expressly did not join in that portion of the Board's decision which evidently disturbed the Court, I feel justified in expressing concern at the language in the Court's opinion.

The Board was aware that the Court's first opinion settled in this Court the question of the validity of an economic lockout, and it was not the Board's purpose in elaborating its contrary position on the remand to have the Court reexamine its holding and to enforce the Board's order on the ground previously rejected. Rather, the Board's purpose in elaborating its position—perhaps unhappily phrased—was to articulate a rationale suitable for review by the Supreme Court, should the occasion for it arise in this case. As matters stood after this Court's first decision, it was the Board's belief that the case was in an inchoate state not ripe for further review. The Board's first decision had been predicated on its finding that the employees had been discharged, and accordingly the Board had stated that "it is not necessary to pass on the question whether the [employers] were privileged to *lay off* their salesmen pending settlement of the contract dispute with the Local." *Morand Brothers Beverage Co.*, 91 N. L. R. B. 409, 410-411. The Court's first decision, however, resolved this legal question and remanded the factual question of discharge for further proceedings.

In this posture the Board believed that an immediate effort to secure Supreme Court review was inappropriate. The legal question decided by the Court had not yet been adopted by the Board in its findings as a basis for its decision in this case. Whether or not this alone should be decisive, it was conjoined with the fact that there still

remained open the narrower factual question which could conclusively terminate the case should the Board be persuaded, and should the Court agree, that the evidence supported a discharge finding. It seemed inopportune at this juncture, therefore, to ask the Supreme Court to pass forthwith upon an avoidable and difficult legal question. The upshot of the Board's thinking, accordingly, was that the better course was to determine the questions put by the Court in its remand order and to defer consideration of further review—which might prove unnecessary—until this Court's final disposition of every facet of the case.

Deferment of review of the legal question decided by this Court did not in the Board's view require its relinquishment in this case, in the sense that it could not thereafter be presented to the Supreme Court. The Board's thinking was influenced by the approach suggested by *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284, and *Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-258. Hence, in order to preserve the opportunity for review by the Supreme Court in due course, but not for the purpose of urging its acceptance by this Court, the Board majority in its second decision, having previously reserved the question, now adopted as its position in this case the view that an economic lockout was invalid. It was only in connection with this preservation of its position for eventual review that the Board, speaking through my three colleagues,* elaborated its view regarding the invalidity of an economic lockout, the Board being of the opinion that it had not yet adequately articulated that position. In doing this the Board was primarily mind-

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* This was the Board action from which I dissented. Please note, however, preferably for correction in the Court's printed opinion, that only *three* (and not four) of my colleagues joined in the Board's majority opinion, as Member Peterson did not participate in the case at all.

ful that even on questions of law "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80, 94.

The Board's conduct of the litigation in this Court on the remand was in fulfillment of this approach. As the Court noted in its opinion, neither in brief nor in oral argument did the General Counsel urge that the Court re-examine its earlier holding with respect to the legality of an economic lockout.

As I said at the outset, my primary purpose in writing the Court in this way is to convey the Board's deep distress that the Court has regarded the Board's conduct as an affront to its processes. Nothing could have been further from my colleagues' minds. I hope that this explanation of my colleagues' thinking will dispel this impression. For the Board's consistent endeavor has been and will continue to be, to adopt the Supreme Court's language, to perform our statutory duty with steadfast "regard to the appropriate function" of the Courts of Appeals in securing the "objects of the statute" through "co-ordinated action." *United States* v. *Morgan*, 307 U. S. 183, 191. It would be most reassuring if the Board could discover, upon reading your opinion when it appears in final printed form, that the Court—having now been informed how this situation developed—had found it possible to modify its language so as to recognize the Board's true purpose.

Very sincerely yours,

PAUL M. HERZOG,
Chairman, National Labor Relations Board.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The initial decision and order of the National Labor Relations Board (R.I. 45)[1] is reported at 91 NLRB 409. The initial opinion of the court below (R. I. 495) is reported at 190 F. 2d 576. The supplemental decision and order of the National

[1] The symbols "R. I." and "R. II." refer, respectively, to the Appendix to Petitioners' Brief in Case No. 10335 and Case No. 10727 in the court below.

Labor Relations Board (R. II. 49) is reported at 99 NLRB 1448. The second opinion of the court below (R. II. 878) is reported at 204 F. 2d 529.

JURISDICTION

The judgment of the court below was entered on May 28, 1953 (R. II. 890) and its supplemental decree was filed on June 26, 1953 (R. II. 891). On August 11, 1953, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Jackson until October 1, 1953, and on September 14, 1953, Mr. Justice Jackson further extended the time until October 24, 1953 (R. II. foll. p. 906). The petition for writ of certiorari was filed on October 24, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in Appendix A to the petition, pp. 25-28.

QUESTIONS PRESENTED

After an impasse had been reached in multi-employer negotiations with a union representing the employees of the various employers, the union called a strike against one of the employers in support of its economic demands. The remaining employers, anticipating an extension of the strike to them, discharged their employees in reprisal against the strike and for the purpose of discourag-

ing membership in the union. The questions presented are:

1. Whether, in the circumstances above outlined the Board may, in the exercise of its authority to prescribe such affirmative action for the redress of unfair labor practices as will effectuate the policies of the Act, award back pay to the discharged employees.

2. Whether the court below properly declined to give decisive weight to the trial examiner's conclusionary inferences of fact which the Board had declined to adopt.

STATEMENT

I. The Board's initial decision and order and the court's first opinion

A. *The facts as found by the Board in its initial decision*—Petitioners, wholesale distributors of alcoholic beverages in Chicago, Illinois, are all members of either the Illinois Wholesale Liquor Dealers Association or the Chicago Wholesale Liquor Dealers Association. Since 1943 the employment terms of the salesmen employed by each petitioner have been governed by a collective bargaining agreement entered into with Liquor and Wine Salesmen's Union, Local 62, Distillery, Rectifying and Wine Workers' International Union of America, A.F.L., herein called the Union. The contracts were negotiated annually, and after the agreement was reached, separate and identical contracts were executed between the Union and each petitioner (R. I. 46, 79-80; 236-240, 241, 242-243, 380).

Early in January 1949 the Union and petitioners commenced negotiations for a collective bargaining agreement to succeed the 1948 contract which, by its terms, was to expire on February 1, 1949 (R. I. 80; 460, 475). Near the end of January the parties reached an impasse in their negotiations on the matter of an increase in commissions for the salesmen and the deadlock continued past March 15, 1949 (R. I. 80; 460-461, 475). Later in March the Union held a meeting attended by the salesmen employed by petitioners and the Old Rose Distributing Company,[1a] and the membership voted unanimously to strike in support of the Union's demands. The strike authorization was general and was not limited to any particular petitioner. (R. I. 81; 209-210, 250.)

Rumors of the proposed strike prompted petitioners about April 1 to prepare a letter to be sent to each of the salesmen in the event of a strike against one or more of the petitioners (R.I. 81; 380-381, 383). The letter, prepared on the stationery of each individual petitioner and signed by the management, stated that petitioners had considered such a strike to be a strike against all petitioners and directed each salesman to return to his employer "immediately any records, papers, credentials or monies" which he might have in his possession and to see his employer regarding any existing financial differences (R. I. 46, 82; 467).

[1a] Old Rose, although involved in the dispute, is not for reasons hereafter stated (*infra*, p. 11, n. 4) one of the petitioners here.

The Associations informed the Union of the preparation of the dismissal letter (R.I. 362) and officials of petitioners exhibited copies of it to the salesmen (R.I. 228-229). The president of the Illinois Association, also vice-president of one of the petitioners, told a meeting of about 22 of his salesmen that if the Union struck any house, they would be "fired" and "automatically * * * get off the payroll right then" (R.I. 164); another petitioner told a union steward employed by him that "if they strike one house we will all be fired" (R.I. 181). And, according to the testimony of the president of Old Rose, the purpose of the letter was "To dismiss the salesmen in the event an attempt was made to divide and conquer by the union with respect to striking one house at a time" (R.I. 47, n. 3; 323, 311).

On April 6, the Union struck Old Rose Distributing Company, a member of the Illinois Association (R.I. 184; 231); immediately thereafter the letters were mailed to all the salesmen (R.I. 46, 83; 321-323, 364-365, 369-370, 379, 383, 467-470). Many of the salesmen, construing the letter as a notice of discharge, failed to report to work (R.I. 46; 143, 153, 159, 163, 187, 191, 195, 202, 229, 232). Those who did report were not allowed to work, in most cases being informed that they were "fired," "through," or "discharged" (R.I. 46, 83-84; 142, 152, 162, 168, 175, 178, 205). To complete their severance from employment, although commissions were usually paid on a quarterly basis, the salesmen were paid for their commissions for the period

through April 7, though this date did not terminate the quarter (R.I. 149, 154, 159, 176, 180, 187, 190, 202, 288-289). Also after some salesmen neglected to turn in the materials and monies requested in the April 7 letter, petitioners renewed the request (R.I. 468, 113, 176, 216, 289-290, R.II. 348, 369, 377-378). Early in May, the strike was settled and all the salesmen returned to work, after the Association and the Union agreed upon the terms of a new contract (R.I. 52, n. 12, 84; 127, 267-268).

B. *The Board's conclusions*—The Trial Examiner found that "the employees of Old Rose were discharged on or about April 8 and the employees of the other Respondents were locked out because of the action of the [Union] in striking Old Rose" and that "such action constitutes discrimination on the part of each Respondent against its employees." (R.I. 84.) The Board also found that all the employers violated Section 8(a)(3) and (1) of the Act, stating, "We find * * *, in agreement with the Trial Examiner, * * * that all the Respondents on or about April 8, 1949, discharged their salesmen * * *" (R.I. 50). Accordingly, the Board ordered petitioners and Old Rose to cease and desist from discouraging union membership by discriminatory alteration of employment tenure or terms or from in any other manner interfering with, restraining or coercing their employees in the exercise of rights guaranteed them by the Act (R.I. 58). The order also required petitioners and Old Rose to make whole their salesmen for any losses they incurred in their earnings by reason of their discharge, as

more specifically prescribed in the Board's decision,[2] and to post appropriate notices (R. I. 58).

C. *First proceedings in the court below*—Upon proceedings to review the Board's order, the court below in its initial decision held that in a situation where multi-employer negotiations have reached an impasse and the union strikes one of the employers with the aim of ultimately compelling all the employers to accede to its terms, the remaining employers may *lockout* their employees to counter the union's strike but may not *discharge* their employees for engaging in a strike (R.I. 504). While finding that Old Rose, the struck employer, had discharged its salesmen, and enforcing the order against it, the court was of the view that as to the remaining employers it "is not at all clear" whether and for what reasons the Board found that they discharged their employees (R.I. 505, 506). Accordingly, the court (R.I. 505-506) remanded the case to the Board, directing it to

> make a clear and explicit finding on the question whether the severance of the employer-employee relation between the various petitioners

[2] The loss in earnings, except as to Old Rose salesmen, is to be computed from the date of discharges to the date the salesmen were rehired (R. I. 87). With respect to the Old Rose strikers, the order provided that they are entitled to back pay only from the date that they may have unconditionally requested reinstatement during the strike (R. I. 58, n. 19). The difference in the back pay award is due to the fact that in the case of the Old Rose employees who were discharged after they went out on strike the loss of wages incurred by them "could not conclusively be attributed to the discharge until the employees had indicated their willingness to abandon the economic strike" (*Kallaher and Mee, Inc.*, 87 NLRB 410, 413) (R. I. 58, n. 19).

(other than Old Rose) and their respective salesmen was intended to be temporary or permanent and, if intended to be temporary in character, in view of the Board's further consideration, whether it was made for the purpose of "interfering or coercing employees in the rights guaranteed to them by Section 7" or as a legitimate exercise of petitioners' economic remedies; and, if permanent, whether, in the light of the principles announced in this opinion, a back pay award would tend to effectuate the policies of the Act.

II. The Board's supplemental decision and order and the court's second opinion

A. *The Board's supplemental findings*—Pursuant to the remand a further hearing was held before the Board at which additional evidence on both the intended duration and purpose of the severance was introduced. One of the principal witnesses called was Allen Schultz, counsel for the Chicago Association during the pre-strike period, who stated categorically and repeatedly that petitioners' "plan was definitely not to create a lockout. * * * The plan at that time was to create a legal discharge"; and that "to get as close to a discharge as possible," petitioners were to direct the salesmen to return "all of their paraphernalia, all of their books and records, and anything that had anything to do with establishing a relationship between the employer and the employee." Schultz further testified that the plan discussed contemplated "maybe not having a union and breaking the

union," stating also, with respect to the salesmen's tenure, "the thought of the organization was that maybe you could do as you pleased after the strike was over, take them back or not take them back" (R. II. 54-55; 224-225). The record further established that according to custom and practice in the industry, a direction with respect to the return of employer materials such as that contained in the April 7 letter is normally synonymous with a discharge rather than a temporary layoff (R. II. 52; 123-124, 162-163, 166, 179, 302-303, 336, 369).

Weighing all the evidence adduced in the original proceeding and in the hearing after remand, the Board concluded that "the evidence preponderates in favor of a finding that in severing their salesmen on April 7, 1949, the Petitioners intended the severance to be a permanent discharge and not a temporary layoff" (R. II. 51).[3]

In answer to the questions put by the court below in remanding the case, the Board found that (1) the severance of the employment relation between petitioners and their respective salesmen was intended to be permanent "and in reprisal for the threat of Local 62 to strike Petitioners, themselves;

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[3] The trial examiner had concluded that the severance was temporary (R. II. 82). The Board, "accepting the Trial Examiner's resolution of the credibility of witnesses, whenever such resolutions have been made, and giving due weight to his findings," reached the above conclusion, stating "In reaching this conclusion we have fully considered all of the circumstantial evidence disclosed by the record, on the basis of which the Trial Examiner reached a result different from ours. We are of the opinion, however, that these factors, considered individually or together, are outweighed by the direct evidence upon which we have relied" (R. II. 51, 57).

that it was calculated to discourage membership in, and to destroy, Local 61; * * * " (R. II. 64); (2) even if the severance were intended to be temporary, its purpose was not limited to the legitimate exercise of "economic remedies" in resisting the strike, but its purpose "was to punish the employees for the Old Rose strike and the apprehended extension of the strike to Petitioners, in order to persuade the employees of the folly of the action taken by their union, to cause disaffection from the Union, and thereby destroy that Union" (R. II. 66); and (3) a back pay award to petitioners' salesmen will effectuate the policies of the Act (R. II. 72-73). Explaining its award of back pay, the Board stated (R. I. 72-73):

> As we have found that the Petitioners intended a permanent severance of all their salesmen, not only in reprisal for the concerted activities, actual and threatened, of its salesmen, but also for the purpose of discouraging membership in, and destroying, Local 62, we perceive no reason for withholding the usual back pay remedy. To hold otherwise would be to leave inadequately redressed conduct flagrantly violative not only of the policy of the Act to protect concerted activities and the right of employees to organize and bargain collective, but also of the overriding policy of the Act to minimize interruptions to commerce. Certainly, when employees are deprived of earnings in order to defeat their exercise of protected activity, it is essential to reimburse them for the loss they have unjustly sustained. We

find, therefore, that the granting of the back pay remedy in the instant case is necessary to, and will, effectuate those policies.

Accordingly, the Board reaffirmed its original order against petitioners (R. II. 73).[4]

B. *The court's second opinion*—Upon proceedings to review the Board's supplemental decision and order the court below stated (R. II. 886):

> * * * Although two issues of fact were presented to the Board, both of which it resolved against petitioners, if either finding is adequately supported by the evidence that ends the matter. That is the further import of our prior decision.
>
> * * * * *
>
> We have read the entire record of the proceedings, as indeed we must to view it properly as a whole, and have concluded that the Board's finding that petitioners intended to sever permanently the employer-employee relationship at the time the April 7 letter was delivered to their employees is supported by adequate substantial evidence * * *.

The court adopted the Board's further finding that the permanent severance was "inspired by an intent to interfere with the employees' selection of a bargaining agent" (R. II. 889). These findings,

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[4] Omitting, however, Old Rose as to which the Board's original order had been previously enforced by the court below (*supra*, p. 7). Old Rose has complied with the provisions of the order directed to it.

the court stated, sufficed to support the Board's order. With respect to the provision of the order requiring petitioners to make the salesmen whole for any loss of pay caused by the discharge, the court below stated (R. II. 889):

> The question of the back pay award "is a broad discretionary one, * * * for the Board * * * not for the courts." *N.L.R.B.* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 346 * * *. Such an order must stand in the absence of a showing of a patent attempt to achieve ends other than those which fairly effectuate the policies of the Act. *Ibid.*

Thereafter, the court below entered its decree enforcing in full the Board's order (R. II. 892-893).

ARGUMENT

1. Petitioners' contention (Pet. 14-19) that the Board abused its discretion in awarding back pay to the discharged salesmen presents no question warranting review by this Court. The permanent severance of the salesmen's employment relationship on April 7, 1949, in order to defeat their exercise of protected activity, constituted, as the Board with the approval of the court below found, a discriminatory discharge in violation of Section 8(a)(3) and (1) of the Act. In these circumstances, as the Board pointed out, no reason exists for withholding the usual back pay award; to hold otherwise, and fail to reimburse employees for losses they have unjustly sustained as a result of such discharge, would be to leave inadequately redressed

conduct flagrantly violative of the policy of the Act to protect employees in the exercise of their right to engage in concerted activities. As this Court has pointed out, "In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees" *National Labor Relations Board* v. *Gullett Gin Co., Inc.*, 340 U.S. 361, 363. And "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347.

Petitioners plainly have made no showing why, if the Board's substantive findings are accepted—and petitioners on this phase of the case do not challenge them—the conventional back pay remedy should be withheld. The heart of their attack upon the back pay order is (Pet. 15, 17-18) that under the "law of the case" as set forth in the initial decision of the court below petitioners could have, without incurring liability for back pay, temporarily severed the salesmen's employment relationship; that there is no evidence that the employees suffered any greater loss of earnings because the severance was found to be permanent rather than temporary and that, therefore, there was no more justification for the Board, under the "law of the case," to award back pay in the case of a permanent severance than in the case of a temporary severance.

But this contention rests upon the clearly erroneous assumption that the court below held that a temporary severance—even if its purpose were to interfere with or coerce the employees' right to engage in protected concerted activities—would have been permissible and have afforded no basis for a back pay award. On the contrary, the court below did not hold that such a temporary severance would be lawful and hence, as petitioners assert (Pet. 15), could furnish "no possible basis for a back pay award." The court in remanding the case to the Board carefully distinguished between a temporary severance "as a legitimate exercise of petitioners' economic remedies" and one "made for the purpose of 'interfering or coercing the employees in the rights guaranteed to them by Section 7.'" (R. I. 506.) Thus, contrary to petitioners' assumption, under the principles laid down by the court below which petitioners accept as the "law of the case" (Pet. 17), even a temporary severance where motivated by a purpose not merely to resist the union's demands but also, as here, to discourage membership in the Union, affords a proper basis for the award of back pay.[5] As stated

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[5] As stated above (*supra*, p. 10), the Board upon the remand made an alternative finding that even if the severance were intended to be temporary, its purpose was not limited to the legitimate exercise of economic remedies in resisting the strike, but its purpose extended to punishing the employees for the Old Rose strike and the apprehended extension of the strike to petitioners in order to discourage membership in, and destroy the Union. The court below, in its second opinion, stated that either finding of the Board, i. e., a permanent severance for a coercive purpose or a temporary severance for a similar purpose, if adequately supported by the record, "ends

above, both the Board and the court below found that the discharge of the salesmen was inspired by such a purpose and, as the court below observed, this "ends the matter" (R. II. 885).[6]

Petitioners' further claim (Pet. 17) of inconsistency between the award of back pay to the Old Rose strikers and petitioners' salesmen overlooks the important difference in the two situations. As

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the matter" (R. II. 885). Thus, although the court in the second proceeding before it found it unnecessary to deal with the Board's alternative finding since it accepted the finding that the severance was permanent, it is clear that even on the basis of a temporary severance prompted by a coercive rather than an economic purpose, the court below would have, contrary to petitioners' assertion, sustained the back pay award.

[6] The Board's finding, approved by the court below, that the severance was "inspired by an intent to interfere with the employees' selection of a bargaining representative" (R. II. 889) removes from this case any question as to whether a discharge limited, in fact, to the same purpose as would, under the decision of the court below (R. I. 503), justify a temporary severance, i. e., to counter and resist a strike, would afford an appropriate basis for a back pay award. However, we believe that even if, contrary to the approved findings of the Board, the discharge here had been prompted by such a purpose, a back pay award might nevertheless be justified. The holding of the court below in its initial decision that it would be a legitimate exercise of economic remedies for employers to lockout employees in order to counter an apprehended extension of a strike presupposes that the severance will from the outset be expressly limited not only to the purpose of resisting the contract demands but in time to the duration of the dispute. In the case of a discharge, the employees are not informed that their severance is limited to the duration of the dispute; the ensuing controversy is thus not confined to the economic differences deadlocking the negotiations; injected into it is the issue of the employees' retention of their employment. In such circumstances, even though the discharge might be prompted by a purpose that would justify a temporary severance, it might well be concluded that a discharge represents an impermissible abuse of the employees' employment and that a back pay award is an appropriate remedy to restore the wages lost as a consequence of the discharge.

noted above (p. 5), the Old Rose strikers were discharged *after* they went on strike In that situation, where the employees are already on strike when they are discharged, it cannot be established that any loss of pay is conclusively attributable to the employer's action. Hence, the Board, as here (*supra,* p. 7, n. 2), normally computes the back pay of the strikers from the date that they make unconditional application for reinstatement. See *Kallaher and Mee, Inc.,* 87 NLRB 410. Where, however, as in the case of petitioners' salesmen, employees not on strike are discriminatorily discharged, the loss of pay stems immediately from the dismissal and is manifestly attributable to the employer's action.

For the foregoing reasons, we submit that the back pay award represents a reasonable exercise of the Board's discretion in framing a remedy to restore the wages lost through petitioners' wrongful impairment of their employees' tenure of employment.

2. Petitioners' contention (Pet. 19-23) that the court below failed to accord the trial examiner's supplemental findings the respect due to them, as prescribed by the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, is without substance. As noted above (p. 9, n. 3), the trial examiner concluded that petitioners intended only a temporary severance of employment. This conclusionary finding rested, as is evident from a reading of the examiner's report (R. I. 75-82), on the examiner's

appraisal of the objective factors favoring and opposing a finding of temporary or permanent severance.[7] The Board rejected the examiner's inference and reached the conclusion that the severance was permanent. In so doing the Board accepted the trial examiner's resolution of the credibility of witnesses "whenever such resolutions have been made" (R. II. 51). It differed with the examiner solely on the ultimate evaluation of the competing circumstances. Since the significance of an examiner's report "depends largely on the importance of credibility in the particular case" (*Universal Camera,* 340 U.S. at p. 496) and the examiner's rejected inferences in this case do not rest on his superior advantage in determining credibility they are entitled to no independent weight as a factor detracting from the Board's conclusion. "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. * * * The findings of the examiner are to be considered along with the consistency and inherent probability of testimony." *Universal Camera,* 340 U. S. at p. 496.

The court below (R. II. 881, 889) carefully noted the disagreement between the Board and the trial examiner. It accorded "the findings of the trial

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[7] Petitioners' claim (Pet. 20-21) that the examiner's inference that the severance was intended to be temporary rested to a great degree, if not entirely, upon his crediting the testimony of eleven of the petitioners to that effect at the second hearing as against the testimony of other witnesses is not borne out by the examiner's report. As the Board observed, the examiner "did not advert to this testimony [of petitioners] in his Supplemental Report." (R. II. 53, n. 6.)

examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial" (*Universal Camera*, 340 U.S. at p. 497). And upon consideration of the entire record, including the examiner's report, it concluded that the Board's findings were adequately supported (R. II. 885, 889). In this setting the decision of the court below fully comports with the principles laid down in the *Universal Camera* case.

There is no conflict in principle between the decision below and the cases cited by petitioners (Pet. 22-23). The different results in the cited cases are attributable merely to the circumstances and the particular facts of the particular case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The position taken by respondent Board in its Brief indicates that it has misconceived the theory of petitioners' argument and has misstated the findings below. This misstatement—that the Court found that petitioners discharged their salesmen for the purpose of discouraging membership in the Union—appears in the Questions Presented (Br. 2), Statement of the Court's second opinion (Br. 11), and Argument (Br. 14). To clarify the Board's misconception and to correct the Board's misstatements is the purpose of this reply.

Board's Position.

The Board does not deny the logic of petitioners' argument that if an award of back pay would not be appropriate in the event of a temporary severance then such

an award would not be proper under the circumstances involved in the instant case even though the severance were held to be permanent. The Board attempts to meet this contention by arguing that the Court below would have sustained the award of back pay even if the severance had been temporary. It is argued that since the Court found the permanent severance to be for an unlawful purpose, it would have also found a temporary severance to have been for the same unlawful purpose,[1] and therefore petitioners' argument is inapplicable.

Petitioners' Argument.

Petitioners' argument as to the award of back pay is that even if the Court below upheld the Board's alternative finding of a wrongful intent in effecting a temporary severance, the added presence of such factor could have no effect upon the question of whether back pay should have been awarded. The wrongful intent with which the employers here might have exercised a right which the Court below held they could lawfully exercise absent any wrongful intent would perhaps have the effect of changing an otherwise lawful action into an unfair labor practice. But the addition of any improper intent could not, under the circumstances here, have caused any financial loss to the employees, whatever effect it may have had upon the Union. An intention to

1. The Board has also suggested that the Court below has already approved the Board's alternative finding that there was a temporary severance with an unlawful intent and that back pay was therefore proper. The Board states (Br. 14): "Thus, contrary to petitioners' assumption, under the principles laid down by the court below which petitioners accept as the 'law of the case' (Pet. 17), even a temporary severance where motivated by a purpose not merely to resist the union's demands but also, as here, to discourage membership in the Union, affords a proper basis for the award of back pay." However, the footnote to this statement admits that the Court "found it unnecessary to deal with" this issue, "since it accepted the finding that the severance was permanent." (Br. 14-15, n. 5.)

permanently discharge is no less unfair than an intention to temporarily discharge for an unlawful purpose. In any event petitioners could have, as the Court below held, temporarily severed the employment of their salesmen for the sole purpose of resisting the "whip-saw." The Board's argument that the added element of wrongful intent would have the effect of justifying an award of back pay clearly indicates a determination on the part of the Board to punish petitioners merely for their supposed motives, rather than for any overt action taken.

The validity of petitioners' argument depends not on what the Court below might have done, but on what it did. The Court did hold that petitioners could properly have temporarily discharged its employees for the duration of the strike against one member of petitioners' associations. If the Board's argument is intended as a denial that such was the holding, then its position presents a conflict between the holdings as to the use of lockout of the Ninth Circuit in *Leonard* v. *N. L. R. B.*, 205 F. 2d 355 (C. A. 9, 1953), and the Seventh Circuit in the instant case. If such is the Board's position we now urge this conflict between circuits as a further ground for granting this petition. If, on the other hand, the Board admits that lockout was available to petitioners but urges in support of the back pay award that these petitioners went too far, either by intending temporary severance plus a bad motive or by intending permanent severance (in itself unlawful), such additional elements might well make the otherwise lawful action discriminatory or an unfair labor practice. The additional elements would not, however, entitle these employees—all of whom were judicially determined to be strategic strikers—to back pay any more than were the Old Rose salesmen. In neither case is the loss of wages "conclusively attributable" to petitioners' conduct.

The Second Opinion of the Court Below.

The Board's assertion in its Brief that the Court below would have sustained the Board's finding that even if petitioners temporarily discharged their salesmen such discharge was with an unlawful intent is not only irrelevant as an attack upon petitioners' argument as to back pay but is also reckless in its regard for the record. The Court below neither reviewed that finding nor indicated its position with respect thereto were it called upon to review such question. The Board has, in its Brief, removed from context the Court's observation near the close of its opinion that the Board found a permanent discharge "inspired by an intent to interfere with the employees' selection of a bargaining agent." (Br. 11.) The Board attempts to transform this observation by the Court as to what the Board—not the Court—found into a finding by the Court. However, when the Court set forth the finding of the Board to indicate what it intended to review, it stated that on the first issue the Board had found that "the evidence preponderates in favor of a finding * * * [of] a permanent *discharge* and not a temporary layoff." (R. II-881.) It was this finding that "adequately complied with the directions of this Court." (R. II-882.) And when the Court came to a consideration of the issues, after admonishing the Board as to the respective functions of superior and inferior tribunals, it described the issue under review as whether there was a temporary severance or layoff as the Trial Examiner found, or a permanent severance, as the Board found. (R. II-885.) This was the issue, which if adequately supported by the evidence "ends the matter." (R. II-885.) Again it described the issue as "When the employer action was taken was it intended that, upon the cessation of the strike, the salesmen would be automatically reinstated or that it would be necessary

for them to reapply for reemployment?" (R. II-887.) The issue the Court reviewed thus had nothing to do with "an intent to interfere with the employees' selection of a bargaining agent" and no relevant evidence of such an intent was mentioned by the Court.

In view of the absence of any finding by the Court below as to unlawful intent as claimed by the Board, petitioners respectfully submit that the use of this mythical finding of the Court by the Board in its Questions Presented, Statement and Argument is wholly unwarranted and is an imposition upon this Court.

If the Board's insistence that the finding as to purpose of the temporary severance is deemed to be important with respect to the back pay question, then petitioners now urge as a further ground for granting the petition that they have been denied judicial review of this Board finding and the cause should be remanded to the Court of Appeals for consideration of this question. *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 661-2 (1949); *Aetna Casualty Co.* v. *Flowers*, 330 U. S. 464, 468 (1947); *Gerdes* v. *Lustgarten*, 266 U. S. 321, 327-8 (1924); *Fox* v. *Gulf Refining Co.*, 295 U. S. 75, 76 (1935).

The Board's Evidence.

The extreme lengths to which the Board has gone to assert that there has been a determination by the Court below sustaining the Board's finding of an intent on the part of petitioners to discourage Union membership, was prompted, petitioners submit, by the desire of the Board to avoid judicial scrutiny of this issue because of the character of the evidence relied on by the Board as supporting its finding as to wrongful intent. The only evidence before the Board that petitioners intended to discourage membership in and destroy the Union is the un-

responsive, gratuitous, and controverted reply of a Board witness on cross-examination. This witness, Allen Schultz, had testified on direct examination that the employers tried to effect a "legal discharge" and not a "lockout" which he said was thought to be illegal. On cross-examination he was asked "Was it our purpose to take these salesmen back when the strike was over?" He replied: "I would say that we had discussions at that meeting that maybe—well, I would say that you had discussions about maybe not having a union and breaking the union." (R. II-227.) That is the only evidence in the entire 1400 page record supporting this finding, and this evidence was directly refuted by witnesses for petitioners who were present at the meeting to which Schultz alluded. (R. II-419-20, 432.) Even this equivocal statement was not fairly stated by the Board in support of its alternative finding. It will be noted the witness had testified that the discussion was about "*maybe* not having a union." The Board described Schultz's testimony—its only support for the finding of unlawful intent—as follows: "He [Schultz] testified that the Petitioners embarked upon their course of action after discussions which contemplated '*not having and breaking the union.*'" (Board's italics, R. II-66.) The "maybe" which the Board omitted in its opinion has been quietly and graciously restored in its Brief. (Br. 8-9.) It is inconceivable that the Court of Appeals would affirm a Board finding based upon such tenuous evidence.

Conclusion.

Petitioners respectfully submit that the Board's Brief well confirms the view expressed by the Court below in its second opinion that the Board in refusing to accept the Court's ruling on the effect of a temporary severance "implies an attitude on the part of these [Board] mem-

bers to have their ultimate judgment that petitioners had engaged in unfair labor practices recognized in any event." (R. II-884.) This attitude of the Board in a vital area of labor-management relations clearly accentuates the need for review by this Court.

Further, it should be noted that the Board has not attempted to controvert the showing made by the petitioners that the questions presented here are of great consequence to employers and employees as well as the public in an already large and rapidly expanding field of multi-employer bargaining. The novel and crucial questions involved are thus tacitly admitted by the Board to be of that magnitude which has historically been the basis of a grant of certiorari by this Court.

Respectfully submitted,

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MAYER, MEYER, AUSTRIAN & PLATT,
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December 1, 1953.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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OCTOBER TERM, 1953.

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MORAND BROTHERS BEVERAGE CO., ET AL.,
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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

The petitioners herein, by Leo F. Tierney, Louis A. Kohn, Stuart Bernstein and Francis W. Collopy, their attorneys, pray that this Court grant rehearing of its order entered herein on December 7, 1953, denying the petition for a writ of certiorari.

In support of this petition, petitioners state that on December 2, 1953, subsequent to the filing herein of petitioners' Reply to Respondent's Brief in Opposition, the Court of Appeals for the Second Circuit (Judges L. Hand, Swan and A. N. Hand) announced its decision in *N. L. R. B.* v. *James Thompson & Co.*, No. 10, which decision did not come to the attention of petitioners until after the entry of the December 7, 1953 order herein. The

decision has not yet appeared in the Federal Reports.[1] This decision raises a direct conflict with the second opinion of the Court of Appeals for the Seventh Circuit in the instant case. (R. II-878.)

In the *Thompson* case, the Court reviewed a cease and desist, collective bargaining and reinstatement order of the Board. This order was based upon the Board's determination that the employer did not act in good faith when expressing doubt as to the union's majority status. A union organizer, after obtaining signatures of at least 40 of 72 employees on application cards, had notified the employer that the union represented a majority of its employees. The employer, through its superintendent, expressed its doubts, and in response to a union suggestion that the cards be checked by a disinterested person, or that an election be held by the State Mediation Board, replied that it would like to speak to the employees and thereupon called a meeting. A union meeting was called for the same hour as the employer meeting and a substantial majority of the employees ended up at the union meeting, out of which a strike was called. There was no factual dispute as to what was said by either the organizer or the superintendent at the time the doubt concerning the union's majority was expressed.

The Trial Examiner found that the superintendent had had bona fide doubt that the union had a majority. The Board reversed this finding, holding that the refusal to deal with the union upon receipt of notice of majority representation was not in "good faith."

The Court (per Judge Learned Hand) held that the issue of "good faith" was one on which the Trial Examiner's finding should have prevailed. Good faith, stated the Court, is a form of credibility. The Court pointed

1. It appears at 33 L. R. R. M. 2205 and Lab. Law Rep. ¶ 67,992.

out the difficulties inherent in any review of findings of a judicial officer "because the review does not bring up that part of the evidence that may have determined his choice." The Court pointed out that it had many times refused to upset findings of an Examiner affirmed by the Board "not because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence the words do not preserve."

The Court then announced a general test for reviewing the findings of a Trial Examiner:

> "We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test."

Thus, holds the Second Circuit, if the holding of the Trial Examiner can be supported by any reasonable inference, it cannot be reversed by the Board.

This holding is obviously in direct conflict with that of the Court of Appeals in the instant case. Here the Examiner made a finding that the "intent" of the petitioners was to temporarily sever the employment of their salesmen. The Board reversed that finding and found the "intent" to be to permanently sever the employment. The Court in reviewing that finding of the Board held that since it was not prepared to say that the evidence relied on by the *Board* was not substantial or adequate, the Board finding should not be set aside. (R. II-889.) This test resolves the "lost evidence" against the finding of the trier-of-facts; it proceeds as though the Board, not the Examiner, were the trier-of-facts.

"Intent" is no more a matter for the specialized knowledge of the Board than is "good faith." Both relate to

motive or state of mind; both are forms of credibility. These issues are for the trier-of-facts. Once they are determined the consequences may be matters for the Board's expertise, but the Board cannot be permitted to change the facts to force a result.

If the findings of a Trial Examiner on issues such as good faith and intent can be overruled by the Board with no greater intervention by reviewing courts than that exercised by the Court below, then findings of the Examiner may be ignored with impunity and fair trial will have been impeded.

Issues such as good faith and intent are of paramount significance in the whole area of labor relations. Acts are frequently lawful or unlawful not because they result in overt differences, but rather because of the motive which induces them. This was recognized recently by this Court in *N. L. R. B.* v. *Local Union No. 1229, IBEW*, No. 15, decided December 7, 1953, where the Court indicated that a discharge for insubordination, disobedience or disloyalty is lawful, but that if in fact such discharge is because of other concerted activities engaged in for the purpose of collective bargaining, it would not be lawful.

The conflict between the *Thompson* case and the instant case is clear. We submit that had the Second Circuit reviewed the instant case petitioners would not now find themselves faced with substantial liability for back pay to hundreds of employees whom they reinstated immediately upon cessation of the labor dispute. It is anomalous that a diametrically contrary result in another circuit should be countenanced.

We believe this irreconcilable conflict clearly calls for the exercise of certiorari jurisdiction by this Court in order to achieve the necessary uniformity in an important phase of the National Labor Relations Act. Moreover,

the conflict here presented affects every phase of administration and enforcement of the Act and is not limited to multi-employer bargaining. Until authoritatively determined by this Court there will be continuing confusion as to the respective functions of the Trial Examiner and the Board, uncertainty in the process of adjudication, and widespread litigation. An early and definitive ruling of this Court is therefore imperative in the interests of orderly and proper administration of the Act.

Conclusion.

Petitioners pray that this petition for rehearing be granted; and that, upon such rehearing, the petition for certiorari be granted.

Respectfully submitted,

LEO F. TIERNEY,
LOUIS A. KOHN,
STUART BERNSTEIN, and
FRANCIS W. COLLOPY,
Attorneys for Petitioners.

MAYER, MEYER, AUSTRIAN & PLATT,
Chicago, Illinois.

December 22, 1953.

CERTIFICATE OF COUNSEL.

Louis A. Kohn, one of the attorneys for Petitioners herein, certifies that this Petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

LOUIS A. KOHN.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR REHEARING

To support their petition for rehearing of this Court's order denying their petition for a writ of certiorari, petitioners claim that the decision below is in "direct conflict" (Pet. for Rehearing, p. 2) with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *James Thompson & Co.*, 33 LRRM 2205, 2206-07 (December 2, 1953). No conflict exists.

The *Thompson* decision is but the most recent addition to the list of cases included by petitioners

in their original petition for a writ of certiorari (pp. 22-23); these cases have in common the circumstance that a reviewing court found unpersuasive the Board's reasons for reversing a trial examiner's findings which rested predominantly on credibility resolutions. It suffices to say of the *Thompson* case, as we explained with respect to the cases previously cited by petitioners, "The different results in the cited cases are attributable merely to the circumstances and the particular facts of the particular case." (Bd's. Opp., p. 18.) The Second Circuit in the *Thompson* case recognizes that even on questions of credibility a trial examiner's findings are not conclusive, but properly observes that the Board's reasons for reversing a credibility determination must be especially cogent because the printed record fails to preserve the demeanor evidence to which much weight must be given. The court below does not express nor imply a different standard. Indeed, both the Board and the court below were careful to point out that reversal of the examiner in the instant case did not involve any rejection of his credibility determinations. The Board noted that it accepted the "Trial Examiner's resolutions of the credibility of witnesses, whenever such resolutions have been made" (R. II. 51). The court below observed that "It [the Board] accepted his resolutions as to credibility" (R. II. 889, 881). Thus the Board differed with its examiner solely in evaluating the competing objective circumstances disclosed by the record. As we explained in our original opposition (pp. 16-18),

correctly applying the rule of review laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, the court below considered the entire record—including the examiner's report—and concluded that the Board's findings had substantial support. There is, therefore, no basis for a claim that the court below in this case has differed with other Courts of Appeals in interpreting the import of the *Universal Camera* rule, or that different results reflect anything more than differences in the records reviewed.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel
National Labor Relations Board

DECEMBER 1953.

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